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Supreme Court of the United States

OCTOBER TERM, 1951

No. 292

GEOTECHNICAL CORPORATION OF DELAWARE,
Petitioner,

versus

THE PURE OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EDMOND E. TALBOT,
SELIM B. LEMLE,
CHARLES KOHLMEYER, JR.,
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Of Counsel:
LEMLE & KELLEHER

HAUSER PRINTING CO., INC., NEW ORLEANS

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To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Geotechnical Corporation of Delaware, respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on June 2, 1952, which affirmed an interlocutory decree of the United States District Court for the Eastern District of Louisiana finding petitioner liable for the loss by explosion of respondent's vessel "Leo Huff".

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is invoked under Section 1254 (1) of the Judicial Code.

The opinion of the Court of Appeals for the Fifth Circuit was filed April 15, 1952. A petition for rehearing was denied June 2, 1952. Upon motion of petitioner, an order was entered by that Court staying the mandate for thirty days, pending the filing of this petition for certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals (R 784) is reported at 196 F. 2d 199. That of the District Court is reported at 94 F. Supp. 866. (R 746). The District Court did not enter findings of fact or conclusions of law.

QUESTIONS PRESENTED

1) Whether the limitation of liability afforded a shipowner under the Limitation Statute (Act of March 3, 1851, c. 43, 9 Stat. 635, as amended by the Act of June 5, 1936, c. 521, 49 Stat. 1480, 46 U.S.C. 183 *et seq.*) grants to a shipowner the right to invoke the protection of the Statute without surrendering to a trustee to be appointed in the limitation proceeding his right of action against a third party to recover for the loss of the vessel in an accident out of which the limitation proceeding arose.

2) Whether a shipowner operating a vessel in violation of the navigation laws and Coast Guard Regulations by permitting the vessel to carry explosives in a prohibited manner, is chargeable with statutory fault in

a proceeding for a recovery for the value of the vessel so as to raise a presumption of negligence against him.

SUMMARY STATEMENT

This is a suit in admiralty for the recovery of $75,000 for the loss by explosion of the "Leo Huff". The Pure Oil Company, a major oil company holding off shore leases in Louisiana coastal waters, entered into a contract with Geotechnical Corporation of Delaware whereby the latter was to conduct a geophysical exploration for its account. Geotech was to furnish qualified personnel and instruments. Pure Oil was to furnish all vessels engaged in the performance of the work. The "Leo Huff", a converted mine sweeper owned by Pure Oil, was one of the vessels so furnished.

On December 5, 1947, while operating under the contract, the "Leo Huff" carried three employees of Pure Oil, a master, an engineer and a cook. There were also on board an observer from the Louisiana Conservation Commission, and three employees of Geotech engaged solely in the seismic work. On that day, an explosion occurred on the "Leo Huff" which caused the total loss of the vessel, the instant death of the three Geotech employees, and serious injury to the other four men.

Shortly after the loss of the "Leo Huff", Pure Oil petitioned the United States District Court for the *Western* District of Louisiana for Exoneration from or limitation of liability. This proceeding was pending at the time the instant case came on for trial (R 72). By proper motions and objections (R 98), petitioner raised the question of the propriety of these proceedings, taking the position that the cause of action for the loss of the

"Leo Huff", as a matter of law, had to be surrendered in the limitation proceeding (Cf. *O'Brien v. Miller*, 168 U.S. 287) and could be urged only by a Trustee appointed therein.

When the explosion occurred, the "Leo Huff" had on board about 10,000 pounds of dynamite for use in the geophysical exploration. It had been authorized by the Coast Guard to carry the dynamite in a magazine constructed for that purpose, but at the time of the explosion, the dynamite was lying in the open on deck in violation of the permit and the Act of Oct. 9, 1940, c. 777, 46 U.S.C. 170 and the Coast Guard Regulations. (The Statute and the pertinent portion of the Regulations are incorporated in the Appendix hereto). Furthermore, subsequent to the issuance of the permit to carry the explosives, a gasoline powered generator had been installed on the deck of the "Leo Huff" near the magazine, a fact which, if it had existed and had been known on the date of the permit, would have caused the application for authority to have been denied. (R 473)

The parties handling the dynamite were instantly killed and no direct testimony of an eye witness could be adduced. Therefore, neither the District Court nor the Court of Appeals has found the exact cause of the explosion. Each court has speculated as to how it occurred, but both courts concluded that liability for the loss of the vessel rested on Geotech.

Both Courts refused to apply the rule of the *Pennsylvania*, 19 Wall. (86 U.S.) 125, 136 (1875): That where a ship is in actual violation of a statutory rule and a loss occurs, a presumption arises that the violation was the sole, or at least a contributory, cause of

the disaster; and that in such a case, the ship carries the burden of showing that her fault not only might not have been but *could* not have been a cause of the loss. If this rule had been applied, the decision herein would have been in favor of Geotech, not Pure Oil.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred

1) In failing to hold that only a Trustee to be appointed in the Limitation Proceeding could recover for the loss of the vessel;

2) In failing to hold that a presumption of fault was created against respondent under the rule of the *Pennsylvania*, which presumption could not be overcome;

3) In affirming the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. The first question involved in this case is one of great importance in the development of the admiralty jurisprudence. To the best of counsel's knowledge, it has never been presented to this Court heretofore.

The facts from which the question stems, and as to which there is no dispute, are as follows: Shortly after the "Leo Huff" exploded and was lost, Pure Oil filed this libel to recover its value in the District Court for the *Eastern* District of Louisiana. Libellant thereafter amended its libel by averring that it (Pure Oil) had petitioned the District Court for the *Western* District of Louisiana for exoneration from or limitation of its liability arising out of the loss of the "Leo Huff" and seeking to hold petitioner liable over to it for personal injury and death claims resulting from the explosion. (R 74)

The question presented is whether, under these circumstances, Pure Oil may carry on the instant litigation to recover the value of the "Leo Huff" or whether the action must be brought by a Trustee to be appointed in the limitation proceeding.

The Limitation Statute (46 USC 181 *et seq.*) provides, *inter alia*, that the liability of a shipowner for personal injuries and property damage shall not exceed "the amount or value of the interest of such owner in such vessel and her freight then pending". The procedure to be followed to obtain the benefit of the Statute requires (Section 3) that the vessel owner, within six months after a claimant shall have given notice of his claim, shall petition the proper United States District Court, and, with the petition, (a) deposit a sum equal to the amount or value of the interest of the owner in the vessel and its pending freight, or (b) transfer to a trustee, to be appointed by the Court, his interest in the vessel and her pending freight.

We submit that the Court of Appeals fell into error when it held that the question of whether or not the limitation proceeding was properly filed or is being properly administered by the District Court for the Western District of Louisiana was "a matter for the limitation court and the claimants there." On the contrary, we submit that by the filing of the limitation proceeding, this respondent voluntarily stripped itself of its right to prosecute this suit and that only a trustee appointed in the limitation proceeding may recover for the value of the "Leo Huff". The issue presented goes to the roots of this controversy—whether Pure Oil is the proper party to prosecute this claim.

It does not appear in the record whether respondent

exercised its statutory option to post security for the value of its interest in the vessel or whether the vessel was transferred to a Trustee. That fact, however, is immaterial, for, as will be pointed out hereinafter, the filing of the limitation proceeding automatically *required* the latter alternative to be followed.

Your Honors have held that the "interest" of the owner of a vessel to be surrendered in a limitation proceeding includes any claim in existence arising out of the incident from which the proceeding stems. The leading case of *O'Brien v. Miller*, 168 U.S. 287, determined the question in the following words:

> "The clear purpose of congress was to require the shipowner, in order to be able to claim the benefit of the limited liability act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight. Where a vessel has been wrongfully taken from the custody of her owners, or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment as compensation for a failure to restore the property. Manifestly, if the option was afforded the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the Act."

This point seems to be conceded. (See Opinion of Court of Appeals, R 787). It is the consequence which flows from the concession which is contested.

We submit that the filing of the limitation proceeding in the Western District of Louisiana effectively vested in the District Court for that District the power

to control all litigation arising out of the loss of the "Leo Huff". One facet of that litigation is the instant libel for the recovery of the value of the vessel.

It is, of course, obvious that the words of the statute afford to a shipowner who desires to the limit his liability under the statute an option either to surrender his vessel and her pending freight and all causes of action ancillary to the vessel, or to furnish a bond to pay into the court of the limitation an amount equal to his interest in his ship. We submit, however, that the option granted in so many words by the statute is not available to a shipowner where a third party cause of action is involved. In such cases the shipowner has no option to exercise and must convey his interest in his vessel (including any cause of action which he may have against a third party) to a Trustee.

Section 3 of the Limitation Act, as originally adopted in 1851 (R.S. 4285), provided "that it shall be deemed a sufficient compliance on the part of (the owner of a vessel) * * * if he shall transfer his interest in such vessel and freight to a trustee" for the benefit of the claimants in the limitation proceeding. Originally, therefore, the act did not grant the option now afforded to the shipowner either to transfer his interest in the vessel to a Trustee or to furnish a bond representing that interest. The option was judicially engrafted on the law by the old Supreme Court Admiralty Rule 54, promulgated on May 6, 1872 (13 Wall. xii).

The Rule as originally adopted after the enactment of the first limitation act afforded to a shipowner the right to post a stipulation for the value of the interest in lieu of transferring the vessel as required by the

statute. Subsequently, in the amendments to the Limitation Act, substantially identical language to that contained in old Admiralty Rule 54 was carried into the Statute. Nevertheless, it was recognized in the cases decided prior to the amendment granting the option that the filing of a stipulation was tantamount to a surrender and that a shipowner who filed a stipulation for value was complying with the Statute. *In re Morrison*, 147 U.S. 14 (1893).

We submit, however, that the option is granted only in those cases where there can be no doubt about the amount of the stipulation, which should be fixed by the Court so as to represent the value of the shipowner's interest in lieu of the interest itself. It might seem that this point is highly technical and theoretical and that it is of no moment. This is not true. A fund must be administered by the Limitation Court and that fund must be fixed at some time during the proceeding. Unless the Limitation Court controls the method of fixing the fund, the Statute, insofar as it provides for the furnishing of a bond, is meaningless.

An excellent example of this fact can be found in the record before your Honors in this case. Pure Oil seeks to hold Geotech liable for the loss of the "Leo Huff". Geotech vigorously contested and is contesting its liability. All lawsuits are subject to compromise, and this case creates no exception. If the parties were to get together and were to compromise their differences, they obviously could do so to the prejudice of the claimants in the limitation proceeding. If respondent's position (and that of the Court of Appeals) is correct, the right of recovery which would be compromised would belong to Pure Oil to treat with as it saw fit in its sole

discretion. The Limitation Court would be bound by the value which Pure Oil itself fixed upon its claim.

The practicalities of this situation cannot be ignored. If this Court holds that Pure Oil Company has the unlimited right to evaluate its claim for damages (which redounds to the benefit of the claimants in the limitation proceeding), the door will be open to fraud and collusion, or, alternatively, to the trial of the same lawsuit in two courts of parallel jurisdiction and dignity. Let us assume, for example, that Pure Oil were to compromise its claim against Geotech for $10,000 and that it would then go into the Limitation Court (as counsel for Pure Oil admits it must) and deposit the $10,000 compromise settlement in the registry of that Court to be administered as a limitation fund. If the argument of respondent is followed, the compromise entered into by two litigants not under any disability would be binding, and the value of the limitation fund would be fixed at the amount of the compromise settlement.

Assume now that the District Court administering the limitation proceeding were to question the compromise which may not have been entered into in good faith. The only possible method that the Limitation Court has at its disposal to evaluate the claim is to try this lawsuit involving the liability of a third party for the loss of the "Leo Huff" to determine the propriety of the compromise. Such a "suit" would not be tried as an adversary proceeding, because Geotech would not be a party thereto. The Court would be required to hear as plaintiff an injured claimant or the personal representative of a deceased claimant, who would be required to prove that the claim of Pure Oil against Geotech was worth more than $10,000 and that the compromise should be

osecuting this claim,
disregarded. Pure Oil, the party prosecu proceeding. Such a
would be the "defendant" in that proce e which we submit
situation is indeed anomalous and one wh
is not contemplated by the statute.

hat the alternative
It is therefore our position that ler the Statute may
remedies afforded to a shipowner under t cases where third
be utilized by the shipowner only in cas this interpretation
party claims are not involved. Under thi by the Limitation
of the Statute, the Trustee appointed by able to litigate ad-
Court would be the only party available and such litigation
verse claims against tort feasors, and r the aegis of the
would necessarily be conducted under th tant shield against
Limitation Court wielding its concomitan nants to the fund.
overreaching or defrauding the claiman

are contending is
The interpretation for which we ar atutes, when read
not abnormal in any way. Many statu ous words, create
with a blind obedience to unambiguous s this Court has
anomalous results. And many times itility of strict ad-
taken occasion to remark upon the futili
herence to empty words.[1]

it be held that the
We submit, therefore, that unless it ole and only judge
Limitation Court in this case is the sole is called upon by
of the value of the fund which it is ess it be held that
Statute to fix and administer, and unless under the Statute
there is no option afforded to Pure Oil u consisting of this
by reason of the litimation fund here c ed result will be
claim against Geotech, an unwarranted vide to fraud and
reached and the door will be opened wi

[1] See *United States v. American Trucking A Associations*, 310 U.S. 534, 543:

> "Frequently, however, even when the he plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (Citations omitted).

collusion. No other safeguard exists.

2. The "Leo Huff" was licensed by the United States Coast Guard for the carriage of explosives under the provisions of Revised Statutes 4472 (46 USC 170), and the Regulations of the Coast Guard issued pursuant thereto (See Appendix). The Statute and the Regulations recognize that the carrying of dynamite and other explosives is in derogation of the right of free navigation on the waters of the United States, and the right to operate a vessel with dynamite aboard is conditioned on compliance with the safety laws enacted in the interest of saving life and property aboard the carrying vessel and other vessels with which the carrying vessel might collide.

The testimony shows that respondent, Pure Oil, was actively violating the Statute and the Coast Guard Regulations at the time of the explosion. It obtained a statutory permit to operate the "Leo Huff", but after the permit was obtained, a gasoline generator was installed in close proximity to the place where the dynamite was to be stored and used. Likewise, a quantity of gasoline was carried on board without the knowledge of the Coast Guard. The Coast Guard Officer who approved the "Leo Huff's" magazine location and construction for account of the District Coast Guard Officer unequivocally stated that he would not have granted approval if he had known that the gasoline powered generator would be carried on the ship. (R 473).

Furthermore, it is admitted by both parties that a comparatively large amount of dynamite had been taken out of the magazine and had been placed in the open on the deck along the rails of the stern of the vessel at the time the explosion took place. It is obvious, therefore,

that the "Leo Huff" was being operated by respondent, Pure Oil, in violation of law when it was destroyed by the explosion. In view of this operation in the face of prohibitory laws, two questions, answered in the negative by the Court below, are here presented for decision: (a) Does the rule of the *Pennsylvania* apply? and (b) Is the dereliction chargeable to Pure Oil Company?

The rule of the *Pennsylvania*, 19 Wall. (86 U.S.) 125 is a landmark in the field of admiralty jurisprudence in that it sets forth a different standard of care from that applied at common law where statutory fault is charged and proved. The rule provides that a vessel guilty of a statutory fault must, in order to escape liability, establish that her violation was not and *could* not have been a contributing cause of the disaster. It stems from a finding by the Supreme Court in the cited case that it was reasonable to presume that a ship in active violation of a statute was at least guilty of contributing to the disaster, even if it was not guilty of the entire fault therefor. The rule is further based on the fact that statutes are made to be followed, not ignored; and that the penalty for failing to follow the mandate of a statute creates a presumption of fault.

Although the rule has been criticised by no less an authority than the late John Wheeler Griffin, one of the outstanding admiralty practitioners at the Bar (see Griffin on *Collision*, 472), it has nevertheless stood the test of time and is still applied by the Courts, even in non collision cases. (cf. *The Material Service*, 1937 AMC 925; *The Denali* (CCA 9), 105 F. 2d 413, 112 F. 2d 952, cert. den. 311 U.S. 687).

It is contended here that Pure Oil, as the owner of the "Leo Huff" was required by the applicable statute

and Coast Guard Regulations to refrain
its vessel on the waters of the United S navigating
of the Explosive Handling Law. The C in violation
that Geotech, and not Pure Oil, had pl below found
powered generator on the deck of the the gasoline
close proximity to the magazine, and th Huff" in
Pure Oil, had placed the dynamite in the eotech, not
on the day of the explosion. It held then on deck
not in a position to charge Pure Oil with eotech was
for its own conduct, and that the presutory fault
Pennsylvania, if applicable at all, would ion of the
strongly against Geotech as against Purrk just as
that the Court fell into grievous error w We submit
it so held.

The holding of the Court of Appea
basic relationship between Pure Oil and gnores the
is not contradicted by either party. Geotech which
pursuant to its contract with Pure Oil, undertook,
seismic exploration over water. Geotech o perform a
with which to conduct the operation, and d no boats
the contract, such equipment was furnished ursuant to
One of the boats so furnished was the Pure Oil.
which, throughout the entire operation, wa eo Huff",
navigated with a Master and crew in t anned and
Pure Oil only, although Geotech employees v employ of
to conduct the exploration work. e on board

In order to facilitate the operation,
powered generator was installed on the deck e gasoline
by Geotech. It is true that this installatio the vessel
for the purpose of permitting the geophysi was made
communicate with one another, but ultimat crews to
fit of ease of communication enured to Pure the bene-
the handling of the exploratory work in tur il because
tated. During the course of the installation was facili-
nd during

the operation of the "Leo Huff" subsequent to the installation, Pure Oil's supervisory employees were present and Pure Oil's Master, of course, knew of the installation. No quarrel between the parties exists in these recitations.

The fact that the generator was placed on the deck of the "Leo Huff" by Geotech rather than Pure Oil did not make it any the less a menace. This fact is shown by the record and by the opinions of the District Court and the Court of Appeals: neither Court has been satisfied that it could find with certainty the cause of the explosion. Your Honors will recognize, of course, that testimony as to causation is necessarily lacking due to the instant death of the three Geotech employees who might have testified as to causation if they had survived. The Courts below were necessarily thrown into the field of conjecture and speculation.[2]

This points up with clarity the necessity of applying the rule of the *Pennsylvania*. Where two Courts of experienced judges find that there is room for speculation as to causation, and where careful investigation and preparation by able counsel for respondent could not ascertain the exact cause of this tragedy, we submit that there is reason for invoking the rationale of the *Pennsylvania* decision as well as the rule itself, and that it must be concluded that the statutory fault of Pure Oil leads to a presumption of negligence which has not been rebutted.

It was argued below and the reasoning of the opinion of the Court of Appeals is pitched upon the theory that the rule of the *Pennsylvania* cannot be applied because the fault in installing the generator and

[2] See opinion of District Court, R 752, and opinion of the Court of Appeals, R 798.

leaving the dynamite in the open on deck should be attributed to Geotech. This completely ignores the fact that the prohibition of statute is not directed in words or in theory at Geotech.

The Statute prohibits a shipowner (in this case Pure Oil) from operating a vessel in violation of the navigation laws. No Statute and no rule of the Coast Guard prohibited Geotech from installing the generator on the "Leo Huff". Your Honors have had numerous illustrations before you as to the question of dual responsibility or sole responsibility in such a situation. For example, in the prohibition cases, where the law prohibited the transportation of intoxicating liquors, any person knowingly transporting liquor was guilty of the crime. In this case Pure Oil, the owner of the vessel, who knowingly operated it on the navigable waters in violation of the Statute, is guilty. Pure Oil is the vessel owner to whom is charged knowledge of all requirements of the navigation laws. Geotech is a geophysical exploration company which has no experience in the field of the ownership or operation of water craft. We submit that this Court should not condone the action of Pure Oil in permitting an illegal installation or condition on board one of its vessels and allow it to escape liability by letting it explain "We knew of the condition and we operated the vessel in violation of law, but since we did not effect the condition, we are not liable for it."

That fallacy is exactly the position of Pure Oil in this case.

It requires no citation of authority to your Honors to show that the owner of a ship and its Master must comply with the navigation laws. The ship itself, under the personification theory of the admiralty, is liable for

its wrongdoings or the fault of its Master. The Master is the agent of the owner, and his acts are those of the owner; likewise his derelictions are the derelictions of the owner, and responsibility for those derelictions may not be evaded by a plea of confession and avoidance. The confession is as inherent in this record as the avoidance is inhibited. The plea of "Forgive them, O Lord, for they know not what they do" is hardly applicable to the case of a vessel owner who knowingly and wilfully permits his authorized agent and employee to operate the vessel in violation of a statutory mandate.

We fear that we failed to make clear our position on this phase of the case to the Court of Appeals.[3] We submit that this is a glaring error in interpretation on which this case should turn. After two courts had failed to find the exact cause of the explosion and after both courts admittedly were forced into the realm of speculation and conjecture, we submit that the rule of the *Pennsylvania* requires a holding that Pure Oil has not carried the burden of showing that its statutory fault in navigating the vessel with the generator on board did not displace the permit. Pure Oil, of course, knew that it was required to obtain a permit to carry explosives because it went to the Coast Guard for such a permit and the permit was obtained. Lt. Commander Roe of the Coast Guard, who was the officer making the inspection of the "Leo Huff" and on whose recommendation the District Coast Guard Officer in fact issued the permit authorizing the "Leo Huff" to carry explosives, testified in unequivocal terms that he had not known

[3] See opinion of Court of Appeals (R 793) to the effect that altho the testimony of the Officer of the Coast Guard who classed the vessel as satisfactory for the carriage of explosives was that he would not have so classified the vessel if he had known of the installation of the generator "this testimony does not invalidate the permit which was issued."

about the installation of the generator and if he had come into possession of such knowledge, the permit would not have been issued.[4]

The same thing which has been set forth above applies with equal force to the dynamite which was being carried in the open on the after deck of the "Leo Huff". The "Leo Huff" was licensed to carry dynamite in a magazine. As your Honors understand, no permit could possibly have been issued to the vessel to navigate with high explosives carried on deck. The natural propensities of dynamite are too well known to conceive of the Coast Guard granting a permit to the vessel if it had been known that dynamite was being carried in any place other than in the magazine specially constructed for its stowage. Yet this vessel was being sailed on American waters with about a thousand pounds of explosives on its deck—almost like a bomb. Pure Oil should pay the penalty for the violation.

Section 1 (14) of the act of October 9, 1940 quoted in the Appendix hereto, imposes a penalty of $2,000 upon any one knowingly violating any of the provisions of the Act, and provides that in case of the violation of the Act by the "owner, charterer, agent, master or person in charge of the vessel", the vessel itself shall be liable for the penalty and may be libeled for forfeiture.

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[4] See Record 473

"Q. Will you inspect the plan which you hold in your hand, Commander Roe, and advise the Court whether or not there appears on that plan any reference to a gasoline generator on the "Leo Huff"?

"A. No sir, there was no reference to a gasoline generator.

"Q. If you were advised that a gasoline generator had been installed on the deck of the Huff operating in the way of the doghouse, the gasoline generator being a one horsepower gasoline powered generator used for the purpose of recharging wet cell batteries, would you have classed that vessel as satisfactory for the charge (should read "carriage") of explosives?

"A. No sir."

Subsection 15 provides that where death or bodily injury result from the violation of the Act, any person knowingly violating the provisions should be fined not more than $10,000 or imprisoned for not more than ten years, or both. The harshness of these penalties indicate clearly that the Congress did not intend adopting a law which was to be honored in its breach. It intended strict compliance and both the "Leo Huff" and Pure Oil were guilty of an active violation of the Statute at the time the explosion occurred. The penalty provided for in the Statute could not have been imposed on Geotech, but only on Pure Oil.

As we have pointed out above and as each of the two courts who have heard this case have held, the exact cause of this explosion has never been determined and can never be ascertained. Pure Oil's expert stated that in his opinion the explosion was caused by one of two alternatives: either the firing line which was being used to explode the charges of dynamite was hooked into the circuit erroneously or the charge of dynamite which had been placed overboard to be exploded for geophysical purposes had fouled on the stern of the "Leo Huff" so as to blow the ship up (R 419). (These two hypotheses were completely discounted by the Court of Appeals.) On the other hand Geotech's experts all testified that the explosion could have taken place through any number of causes, including the sparking of the gasoline container or the generator, both of which were illegally on board the vessel.

Moreover, as the Court of Appeals points out in its opinion (R 797), "The credible evidence is that a charge of (33-1/3 pounds of dynamite) would not have injured the Huff so much * * * ". If, therefore, the dynamite had not been permitted by Pure Oil to lie in open on the deck of the "Leo Huff", the worst that could have hap-

pened to the vessel would be that a single charge would have been exploded and possible minor damage would have ensued. In any event, the "Leo Huff" would not have been sunk by virtue of the detonation of such a charge on deck.

It follows, therefore, that if the rule of the *Pennsylvania* were invoked in this case against Pure Oil, then that Company would be unable to carry the burden which is imposed upon it under the rule and show that its dereliction could not have caused the explosion. The case, therefore, turns on the merits on the question of the applicability of the rule to the facts adduced at the trial.

We submit that the rule should be applied and that the courts below erred in failing to force Pure Oil to carry the burden imposed upon it under the rule.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 22, 1952.

APPENDIX

Act of October 9, 1940, c. 777, 54 Stat. 1023, 46 U.S.C. 170

§ 170. Regulation of carriage of explosives or other dangerous articles on vessels.—Vessels defined

(1) The word "vessel" as used in this section shall include every vessel, domestic or foreign, regardless of character, tonnage, size, service, and whether self-propelled or not, on the navigable waters of the United States, including its Territories and possessions, but not including the Panama Canal Zone, whether arriving or departing, or under way, moored, anchored, aground, or while in drydock; it shall not include any public vessel which is not engaged in commercial service, nor any vessel subject to the provisions of section 391a of this title, as amended, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in bulk in its own tanks: *Provided*, That the provisions of subsection (3) of this section shall apply to every such vessel subject to the provisions of section 391a of this title, as amended, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in bulk in its own tanks.

* * * * *

Transportation, etc., of certain high explosives on passenger-carrying vessels prohibited; exceptions

(4) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any passenger-carrying vessel any high explosives such as, and including, liquid nitroglycerin, dynamite, trinitrotoluene, picrates, detonating fuzes, fireworks that can be exploded en masse, or other explosives susceptible to detonation by a blasting cap or detonating fuze, except ship's signal and emergency equipment, and samples of such explosives (but not including liquid nitroglycerin) for laboratory or sales purposes in restricted quantities

as may be permitted by regulations of the Commandant of the Coast Guard established hereunder.

Same; non-passenger-carrying vessels

(5) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any vessel other than a passenger-carrying vessel, any high explosive referred to in subsection (4) of this section except as permitted by the regulations of the Commandant of the Coast Guard established hereunder.

Transportation, etc., of other explosives or other dangerous articles; exceptions

(6) (a) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use (except as fuel for its own machinery) on board any vessel, except one specifically exempted by paragraph (b) of this subsection, any other explosives or other dangerous articles or substances, including inflammable liquids, inflammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous articles or substances, hazardous articles, and ships' store and supplies of a dangerous nature, except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: *Provided*, That all of the provisions of this subsection relating to the transportation, carrying, conveying, storing, stowing, or use of explosives or other dangerous articles or substances shall apply to the transportation, carrying, conveying, storing, stowing, or using on board any passenger vessel of any barrels, drums, or other packages of any combustible liquid which gives off inflammable vapors (as determined by flash-point in open cup tester as used for test of burning oil) at or below a temperature of one hundred and fifty degrees Fahrenheit and above eighty degrees Fahrenheit.

(b) This subsection shall not apply to—

(i) vessels not exceeding fifteen gross tons when not engaged in carrying passengers for hire;

(ii) vessels used exclusively for pleasure;

(iii) vessels not exceeding five hundred gross tons while engaged in the fisheries;

(iv) tugs or towing vessels: *Provided, however,* That any such vessel, when engaged in towing any vessel that has explosives, inflammable liquids, or inflammable compressed gases on board on deck, shall be required to make such provisions to guard against and extinguish fire as shall be prescribed by the Commandant of the Coast Guard;

(v) cable vessels, dredges, elevator vessels, fireboats, ice-breakers, pile drivers, pilot boats, welding vessels, salvage and wrecking vessels;

(vi) inflammable or combustible liquid cargo in bulk: *Provided, however,* That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title.

Regulations for protection against hazards created by explosives or other dangerous articles

(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsection (3), (4), (5), or (6) of this section apply—

(a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section with respect to the descriptive names, packing, marking, labeling, and certification of such explosives or other dangerous articles or substances; with respect to the specifications of containers for explosives or other dangerous articles or substances; with respect to the marking and labeling of said containers; and shall accept and adopt for the purposes above mentioned in this subsection such definitions, descriptions, descriptive names, classifications,

specifications of containers, packing, marking, labeling, and certification of explosives or other dangerous articles or substances to the extent as are or may be established from time to time by the Interstate Commerce Commission insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water. The Commandant of the Coast Guard shall also establish regulations with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessel; with respect to the disposition of any explosives or other dangerous articles or substances found to be in an unsafe condition; with respect to the necessary shipping papers, manifests, cargo-stowage plans, and the description and descriptive names of explosives or other dangerous articles or substances to be entered in such shipping documents; also any other regulations for the same transportation, carriage, conveyance, storage, stowage, or use of explosives or other dangerous articles or substances on board such vessels as the Commandant of the Coast Guard shall deem necessary; and with respect to the inspection of all the foregoing mentioned in this paragraph. The Commandant of the Coast Guard may utilize the services of the Bureau for the Safe Transportation of Explosives and Other Dangerous Articles, and of such other organizations whose services he may deem to be helpful.

(b) The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall, insofar as applicable to them, respectively, be binding upon shippers and the owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances: *Provided*, That this section shall not be construed to prevent the transportation of military or naval forces with their accompanying munitions of war and stores.

(c) Nothing contained in this section shall be construed to relieve any vessel subject to the provisions of this section from any of the requirements of title 52 (secs. 4399 to 4500, inclusive) of the Revised Statutes or Acts amendatory or supplementary thereto and regulations thereunder applicable to such vessel, which are not inconsistent herewith.

(d) Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder.

Masters, owners, etc., required to refuse unlawful transportation of explosives or other dangerous articles

(8) Any master, owner, charterer, or agent shall refuse to transport any explosives or other dangerous articles or substances in violation of any provisions of this section and the regulations established thereunder, and may require that any container or package which he has reason to believe contains explosives or other dangerous articles or substances be opened to ascertain the facts.

* * * * *

Violation of section or regulations; penalty; liability of vessel

(14) Whoever shall knowingly violate any of the provisions of this section or of any regulations established under this section shall be subject to a penalty of not more than $2,000 for each violation. In the case of any such violation on the part of owner, charterer, agent, master, or person in charge the vessel shall be liable for the penalty and may be proceeded against by way of libel in the district court of the United States in any district in which such vessel may be found.

Same; increased penalty in event of personal injury or death

(15) When the death or bodily injury of any person results from the violation of this section or any regulations made in pursuance thereof, the person or persons who shall have knowingly violated or caused to be violated such provisions or regulations shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Code of Federal Regulations (1949 Ed.), Title 46—Shipping

(The following excerpts were originally promulgated in Order 74, 6 F.R. 254, as amended by CGFR 47-35, 12 F. R. 4184)

146.01-1 **Purpose of Regulations.** The purpose of the regulations in this subchapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States * * *

146.02-1 (a) **Scope of regulations.** The regulations in this part define explosives or other dangerous articles or substances, and combustible liquids for purposes of safety in transportation or storage on board vessels * * *

(d) Set forth the provisions under which permitted explosives or other dangerous articles or substances, and combustible liquids within the scope of the definitions given herein, may be accepted, handled, stored, stowed, or transported on board vessels * * *

(e) Establish such other requirements as may be necessary to make effective the purposes of R.S. 4472, as amended.

146.02-2 **Application to vessels.** The regulations in this subchapter apply to all vessels, domestic, or for-

eign, regardless of character, tonnage, size, service and whether self-propelled or not, whether arriving or departing or underway, moored, anchored, aground or while in dry dock to the extent and in the manner indicated herein.

146.02-4 **Application to others.** The provisions of the regulations in this part, insofar as applicable to them respectively, are binding upon owners, charterers, agents, masters or persons in charge of vessels, subject to the regulations in this part and upon all other persons transporting, carrying, conveying, handling, storing, or stowing on board such vessels, any explosives or other dangerous articles or substances, and combustible liquids.

146.02-5 **Compliance.** The applicable provisions of the regulations in this part shall be observed by:

(a) All vessels, domestic or foreign, subject to the regulations in this part, and the owners, charterers, agents, masters or persons in charge of such vessels.